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Co-Conspirator Declarations: Procedure and Standard of Proof for Admission under the Federal Rules of Evidence

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CO-CONSPIRATOR DECLARATIONS: PROCEDURE AND STANDARD OF PROOF FOR ADMISSION UNDER THE FEDERAL RULES OF EVIDENCE

> Surveillance agents assigned to the scene of an anticipated drug sale observed a meeting between Grey and Johnson. The two either shook hands or crossed their hands, fists opening and closing, immediately before and immediately after Grey sold a packet of heroin to an undercover narcotics agent. Both Johnson and Grey were arrested and charged with the sale of and with conspiracy to sell narcotics. Grey was tried separately and was unavailable as a witness against Johnson. At Johnson's trial, the surveillance agents testified about the observed contact between Grey and Johnson. In addition, the prosecution sought to introduce the undercover agent's testimony of a meeting with Grey shortly before the drug transaction. The agent stated that Grey had pointed to Johnson, who was getting into a car, and had told the agent that his 'partner, Joe' was going to get the heroin. Johnson's first name is Joe.[1]

The hearsay rule[2] should preclude Grey's incriminating statement to the agent. Yet, even before the Federal Rules of Evidence were enacted in 1975, the remark might have been admissible evidence at trial due to an exception to the hearsay rule.[3] Now under the new Federal Rules of Evidence,[4] such statements are not hearsay "if offered against a party and . . .[made] by a co-conspirator of a party during the course and in furtherance of the conspiracy."[5] Thus, rule 801(d)(2)(E) changes remarks made by co-conspirators to nonhearsay.

Under the common law rule, these statements generally were thought to have been excepted from classification as hearsay due to the theory that co-conspirators are partners in crime and thus become each other's agents:[6]

1. The facts are loosely based on those in United States v. Herrera, 407 F. Supp. 766 (N.D. Ill. 1975).

2. Hearsay is an out-of-court declaration offered to prove the truth of the matter asserted. Hearsay is generally inadmissible because the declarant, not being in court, is not subject to cross-examination. Therefore, the statement is not considered reliable enough for the trier of fact to consider it. 5 J. WIGMORE, EVIDENCE §§ 1361-62, 1420 (Chadbourn rev. 1974).

3. Statements of co-conspirators in furtherance of the conspiracy were considered exceptions to the hearsay rule prior to the enactment of the Federal Rules of Evidence. *See, e.g.*, Krulewitch v. United States, 336 U.S. 440 (1949).

4. FED. R. EVID. 101-1103.

5. FED. R. EVID. 801(d)(2)(E) [hereinafter referred to as rule 801(d)(2)(E)]. The rule applies in both criminal and civil cases. *See* United States v. One 1975 Lincoln Continental, 72 F.R.D. 535 (S.D.N.Y. 1976).

6. Anderson v. United States, 417 U.S. 211, 218 n.6 (1974). However, the Advisory Committee's Notes indicate that the agency theory of conspiracy is a fiction at best. Co-conspirator declarations have been classified as nonhearsay as a result of the adversary system, which has

> Such declarations are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.[7]

More likely, the true reason for the co-conspirator nonhearsay rule is that such statements are a necessity if the crime of conspiracy, normally carried out in secret, is ever to be proved.[8]

Yet, before a co-conspirator's remarks can be entered into evidence and considered against a defendant, four prerequisites must be met. Initially, the existence of a conspiracy and the party/defendant's participation in the conspiracy must be shown.[9] In addition, rule 801(d)(2)(E) requires two further elements, that the statement was made in the course[10] and in furtherance of the conspiracy.[11] It is not a prerequisite that a conspiracy be one of the formal charges, since "a joint venturer is considered as a co-conspirator for the purposes of the rule."[12]

However, the Federal Rules of Evidence do not resolve the following two aspects of the procedure for admitting co-conspirator utterances:

(1) Does the judge or jury decide if the prerequisites to admitting the statements have been met?

(2) How much evidence must be presented to show the

already established that statements by a conspirator can be admitted against a co-conspirator. 28 U.S.C. app., Notes of Advisory Committee on Proposed Rules [of Evid.], Rule 801, Subdivision(d)(2) (1976).

7. Van Riper v. United States, 13 F.2d 961, 967 (2d Cir.), *cert. denied*, 273 U.S. 702 (1926).

8. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 801(d)(2)(E)[01], 801-143 (1977).

9. To establish the existence of a conspiracy for purposes of the co-conspirator rule, the elements of the crime of conspiracy (*i.e.*, meeting of the minds, criminal intent and an overt act) need not be shown. Rather, a sufficient showing must be made of a partnership in the illegal activity.

10. The most frequent issue arising under the "in the course of the conspiracy" requirement is whether arrest terminates the conspiracy. *See* Krulewitch v. United States, 336 U.S. 440 (1949); United States v. Caro, 569 F.2d 411 (5th Cir. 1978); United States v. Di Rodio, 565 F.2d 573 (9th Cir. 1977); United States v. Testa, 548 F.2d 847 (9th Cir. 1977). For a case considering when conspiracy ends, *see* United States v. Kahan, 572 F.2d 923, 935-36 (2d Cir. 1978). For a case treating withdrawal from the conspiracy, *see* United States v. Geaney, 417 F.2d 1116, 1121 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

11. The requirement that the statement be in furtherance of the conspiracy has been generously applied. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 801(d)(2)(E) [01], 801-146-47 (1977). *But see* the analysis of the "in furtherance" requirement in United States v. Mangan, 575 F.2d 32, 43-44 (2d Cir. 1978).

12. 28 U.S.C. app., FED. RULE EVID. 801, SENATE JUDICIARY COMMITTEE REPORT 93-1277. *See also* United States v. Buschman, 527 F.2d 1082, 1084 (7th Cir. 1976); United States v. Olweiss, 138 F.2d 798, 800 (2d Cir.), *cert. denied*, 321 U.S. 744 (1943).

existence of the conspiracy and the defendant's participation in it?

Rule 104 of the Federal Rules of Evidence[13] offers some guidance regarding the correct procedure by delineating the function of judge and jury in deciding issues of preliminary fact. Under the rule, the judge is to determine the admissibility of evidence, except when the relevancy of the evidence is dependent upon a factual determination by the jury. Despite the failure of some courts to consider the impact of rule 104 on admissions of co-conspirator statements under rule 801(d)(2)(E), a majority of the federal courts have adopted a procedure whereby the judge decides whether or not to admit declarations of joint venturers.

Integrally related to the question of who decides to admit the remarks of co-conspirators is the question of the appropriate standard of proof to be met by the evidence which shows a joint venture. Neither rule 801(d)(2)(E) nor rule 104 offers a definitive answer to the burden of proof issue. Consequently, there is a disparity between the standards of proof exacted by different federal courts. Presently, a trend is becoming apparent as more circuit courts of appeals adopt a preponderance of the evidence standard.

This note will describe the ways in which the various federal circuit courts of appeals have construed the Federal Rules of Evidence to affect admission of co-conspirator declarations.[14] It will then suggest the preferable resolutions to the questions of whether the judge or jury should decide to admit statements of co-conspirators and whether the admission should be based on a standard of beyond a reasonable

13. The rule provides that:

(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of jury.* Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) *Weight and credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

FED. R. EVID. 104 [hereinafter referred to as rule 104].

14. *Cf.* White, *The Preliminary Question of the Existence of Conspiracy for Admitting Statements Under Federal Rules of Evidence 801(d)(2)(E) and 104(a): The Continuing Vitality of the Federal Common Law of Evidence*, 21 ATLA L. REP. 309 (1978) (illustrating that the codified Federal Rules of Evidence nevertheless allow for judicial interpretation).

doubt, a preponderance of the evidence, a prima facie showing or substantial evidence.[15]

ADMISSIBILITY OF DECLARATIONS: JUDGE OR JURY QUESTION

Traditionally, a trial judge could allow co-conspirator declarations to be introduced upon the condition that subsequent evidence shows a conspiracy and connects the defendant to it. The jury often was given a cautionary instruction that, until such further proof was made, the statement could only be used against the declarant.[16] At the close of the case, if the judge was satisfied that there was evidence of the defendant's involvement in a conspiracy sufficient to admit the statement of a co-conspirator, he or she would resubmit the admissibility issue to the jury. The jury was told it could consider the declaration against the co-conspirator defendant only after it concluded that a conspiracy existed and that the statement was made in the course of and in furtherance of the conspiracy.[17]

Although rule 104[18] now governs consideration of preliminary questions or conditions which must be met for rule 801(d)(2)(E) to apply, it has not fully resolved the problem of whether it is the judge or the jury who should decide if a declarant's statements may be considered against an alleged co-conspirator. Rule 104(a) states that preliminary questions about the admissibility of evidence are to be decided by the judge and that he or she generally need not be bound by the rules of evidence. Rule 104(b) deals with preliminary questions about the relevancy of evidence. When the relevancy depends on showing a condition of fact, the judge must admit the evidence subject to a jury finding that the condition was fulfilled.[19]

15. It is not the purpose of this note to question the validity of the rule. For a discussion of this question *see generally* Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954); Comment, *The Co-Conspirator Exception to the Hearsay Rule: The Limits of Its Logic*, 37 LA. L. REV. 1101 (1977). Nor is it within the purview of the topic to describe challenges which have been made to the co-conspirator rule of evidence on the grounds of the accused's sixth amendment right to confront witnesses testifying against him. For a description of such challenges *see generally* Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972); Garland & Snow, *The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L. 1 (1972); Younger, *Confrontation and Hearsay: A Look Backward, A Peek Forward*, 1 HOFSTRA L. REV. 32 (1973).

16. 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 104[05], 104-43 n.17 (1977).

17. *See* text accompanying note 59 *infra*.

18. For the text of rule 104 *see* note 13 *supra*.

19. The Advisory Committee's Note makes clear the procedure intended under rule 104(b). That Note states:

> The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude

Rules 104(a) and (b) have not conclusively settled the judge/jury issue because the admissibility of co-conspirator declarations can be characterized as dependent on the competency of the evidence or as dependent on a finding of conditional relevancy. If one views a co-conspirator's statement as relevant to the defendant's guilt, but barred until it is found to be reliable (competent) enough to warrant admission, rule 104(a) prescribes that the preliminary question is for the judge to determine, as are other hearsay or privilege questions. On the other hand, if one views the co-conspirator's statement as irrelevant to the defendant's guilt, and therefore inadmissible, unless he is first found to be part of the conspiracy, rule 104(b) requires that the preliminary question of relevancy be decided by the jury.[20]

Determination by Judge

Since the passage of the Federal Rules of Evidence, several courts have addressed the effect of rule 104 on the question of who decides if rule 801(d)(2)(E), the co-conspirator rule of evidence, applies in a given case. The United States Courts of Appeals for the First,[21] Fifth,[22] Sixth,[23] Seventh,[24] and Eighth[25] Circuits have ruled that rule 104(a) requires that the judge decide if preliminary conditions have been met before admitting a co-conspirator's declarations. The Second[26] and Ninth[27] Circuits held that the trial judge was responsible for admitting such statements, long before the new rules went into effect. The Third Circuit[28] also has held that the judge must decide the admissibility of co-conspirator statements, although it did not rely on rule 104.

Reliance on Rule 104(a)

The first court to consider the applicability of the new rules to the procedure for admitting co-conspirator declarations was the United

that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration.

28 U.S.C. app., Notes of Advisory Committee on Proposed Rules [of Evid.], Rule 104, Subdivision (b) (1976).

20. 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 104[05], 104-40 (1977).
21. United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).
22. United States v. James, 576 F.2d 1121 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir. 1979).
23. United States v. Enright, 579 F.2d 980 (6th Cir. 1978).
24. United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978).
25. United States v. Bell, 573 F.2d 1040 (8th Cir. 1978).
26. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).
27. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).
28. United States v. Trowery, 542 F.2d 623 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977).

States Court of Appeals for the First Circuit in *United States v. Petrozziello*.[29] In that case, the appellant challenged the sufficiency of the independent nonhearsay evidence showing a conspiracy between himself and the man who sold narcotics to drug agents. Petroziello claimed that the dealer's remark to the agents that Petrozziello was his connection should not have been admitted under the co-conspirator rule. Although the appellant did not challenge the procedure followed for determining admissibility of the dealer's statement to the agents, the reviewing court nevertheless examined what had happened at trial. The trial judge had insisted that the government present all of its nonhearsay proof before he ruled on whether that evidence supported admission of the co-conspirator statement. However, at the close of the case, he had allowed the jury to weigh the admissibility of the declaration. The appellate court concluded that rule 104(a) changed the way in which the traditional co-conspirator hearsay exception was to be applied in the First Circuit. Whereas the jury formerly decided whether or not to invoke the co-conspirator rule, admissibility now was solely for the trial judge to decide.[30]

A similar conclusion was reached in the recent Fifth Circuit case of *United States v. James*,[31] where the appellants claimed to have been entitled to a pretrial hearing, out of the jury's presence, at which the judge would rule on the admissibility of co-conspirator declarations. Instead, the trial judge followed traditional practice in the Fifth Circuit whereby the judge and the jury shared the role of admitting such statements. The judge made a preliminary determination that the evidence, independent of the disputed statement, was sufficient to support a jury finding that a conspiracy existed and that the declarant and defendants were members. A cautionary instruction was given to the jury when the co-conspirator declaration was introduced. When the case was submitted to the jury, it was again instructed that it could not consider the statement against a defendant unless it first found the conspiracy existed, the defendant and declarant participated in it, and the statement was made in the course of and in furtherance of the conspiracy. Thus, the jury decided for itself whether the conditions for admitting the remark of a co-conspirator had been met. The Fifth Circuit, in reviewing

29. 548 F.2d 20 (1st Cir. 1977).

30. Although the prescribed method for admitting a co-conspirator's statement was not observed by the trial court in *Petrozziello*, the reviewing court refused to overturn the verdict because the procedure had not been challenged as error and because the additional fact-finding by the jury could hardly prejudice the appellant. *Id.* at 23.

31. 576 F.2d 1121 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir. 1979).

the case, noted the possible prejudice to a defendant when the jury hears statements made by an alleged co-conspirator before the admissibility of the declaration has been determined.[32] It held that rule 104(a) now requires the judge alone to decide whether co-conspirator declarations are admissible.[33]

Likewise, in *United States v. Enright*,[34] the United States Court of Appeals for the Sixth Circuit found that rule 104(a) governs admission of co-conspirator statements. After being convicted of conspiracy to violate gambling laws, the police chief defendant objected to the introduction at trial of several recorded conversations in which he was implicated in the conspiracy by a co-defendant. At trial, the judge initially admitted the taped conversations, but later instructed the jury that it was to find the conspiracy existed and that Enright was a member of it before it could take into consideration the recorded statements. The court of appeals disapproved the use of such a confusing and inconsistent jury instruction when it held that rule 104(a) was applicable to the admission of co-conspirator declarations.[35]

In *United States v. Santiago*,[36] the Seventh Circuit also concluded that rule 104(a) requires the trial judge to decide the admissibility of joint venturer declarations. Before trial, the defendant had submitted a motion *in limine* to exclude the use of statements made by his alleged partners in the heroin sale. The motion was denied after the judge conducted a hearing and made a finding that the existence of the conspiracy had been established sufficiently to permit the jury to hear the declarations. When the statements were introduced at trial, the jury was cautioned as to the limited use it could make of the remarks until each juror was independently convinced that a conspiracy existed. The jury was again instructed to this effect before it began its deliberations. On appeal, Santiago objected that the judge did not specifically rule on the admissibility of the statements. The Seventh Circuit found it unnecessary, in the absence of new evidence, for the judge to reconsider at trial the same proof he had previously considered in ruling on the motion *in limine*.[37] The reviewing court found no error in the procedure of resubmitting the admissibility question to the jury, but noted that in future cases such a practice would be undesirable.[38]

32. *Id.* at 1129-30, 590 F.2d at 579.
33. *Id.* at 1130, 590 F.2d at 579-80.
34. 579 F.2d 980 (6th Cir. 1978).
35. *Id.* at 984, 987.
36. 582 F.2d 1128 (7th Cir. 1978).
37. *Id.* at 1131.
38. *Id.* at 1136.

The case of *United States v. Bell*,[39] provided the United States Court of Appeals for the Eighth Circuit with the opportunity to consider whether the judge or jury should admit co-conspirator remarks. There the appellant, convicted of selling two sawed-off shotguns without paying the transfer tax, challenged the admissibility of remarks exchanged during telephone conversations between undercover agents and the man who arranged the gun sale. The court found the statements to be admissible as co-conspirator declarations. It further set forth its view that rule 104 requires the judge to preliminarily make a formal finding of the admissibility of co-conspirator statements out of the jury's hearing before the jury may consider the remarks against the defendant.[40]

Each of these five recent opinions indicates that rule 104(a) requires that the trial judge, rather than the jury, decide whether co-conspirator declarations are admissible against a defendant. However, the original case relying on rule 104(a), *United States v. Petrozziello*,[41] restricted the role of the jury in deciding the admissibility question without closely examining the applicability of rule 104(b) to co-conspirator remarks.[42] The Eighth Circuit in *United States v. Bell*[43] merely adopted rule 104(a) on the strength of the First Circuit's *Petrozziello* decision, and failed to consider the interplay between rules 104(a) and 104(b). While the Sixth Circuit recognized that either rule 104(a) or 104(b) might apply to the preliminary question of admitting co-conspirator statements, it concluded that the issue is "one of the basic reliability and fairness of admitting the evidence rather than a relevancy question"[44] without considering the policy reasons underlying its choice.

Finally, in *United States v. James*,[45] the Fifth Circuit carefully analyzed the preliminary question of admitting co-conspirator statements. The court recognized that admissibility could be viewed as a question either of the competency of the evidence or of conditional relevancy. The opinion reasoned that rule 104(a) should apply, since allowing the jury to decide admissibility as a question of conditional relevancy under rule 104(b) might prejudice the defendant. It felt it is unrealistic

39. 573 F.2d 1040 (8th Cir. 1978).

40. *Id.* at 1043, 1044. In view of the newly enunciated policy, the trial court's failure to make a formal finding of admissibility was not plain error.

41. 548 F.2d 20 (1st Cir. 1977).

42. *Id.* at 22.

43. 573 F.2d 1040, 1043 (8th Cir. 1978).

44. United States v. Enright, 579 F.2d 980, 984 (6th Cir. 1978).

45. 576 F.2d 1121, 1128-30 (5th Cir. 1978). *See also rehearing en banc*, 590 F.2d 575, 579-80 (5th Cir. 1979).

to expect a jury to be able to decide the admissibility of co-conspirator declarations before it considers those statements against the defendant in deciding his or her guilt. If the jury fails to make the two-step determination, the defendant may well be prejudiced by co-conspirator statements which are decidedly relevant but which have never been ruled admissible.

The Seventh Circuit in *United States v. Santiago*,[46] also construed the admission of co-conspirator statements to be a question of the reliability of the evidence for the judge to decide under rule 104(a), rather than a question of conditional relevancy. In rejecting a jury determination under rule 104(b), that court observed that it is a near impossibility for jurors to mentally isolate the co-conspirator remarks while they decide the admissibility of these statements.

Without Reliance on the Rules of Evidence

Both the United States Courts of Appeals for the Second and Ninth Circuits decided, long before the enactment of the new Federal Rules of Evidence, that it was more logical for the trial judge to determine the admissibility of co-conspirator declarations. The underlying logic of both courts was best expressed by Judge Learned Hand, in the Second Circuit case of *United States v. Dennis*.[47] In *Dennis*, Judge Hand noted that even if a jury could consider such statements separately until it had concluded the declarations were competent evidence,[48]

> [i]t is difficult to see what value the declarations could have as proof of the conspiracy, if before using them the jury had to be satisfied that the declarant and the accused were engaged in the conspiracy charged; for upon that hypothesis the declarations would merely serve to confirm what the jury had already decided. In strict logic these instructions in effect altogether withdrew the declarations from the jury, and it was idle to put them in at all.[49]

Likewise, the United States Court of Appeals for the Ninth Circuit in *Carbo v. United States*[50] established its position that the judge alone should decide the admissibility of co-conspirator declarations. Once such statements are admitted into evidence against a defendant, the jury is not instructed to reconsider the independent proof of the defendant's involvement in the conspiracy before attributing the remark to him.

46. 582 F.2d at 1128, 1131-33 (7th Cir. 1978).
47. 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).
48. *Id.* at 230.
49. *Id.* at 230-31.
50. 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

In the more recent case of *United States v. Stanchich*,[51] the United States Court of Appeals for the Second Circuit, without relying on rule 104, reaffirmed its long-standing view that it is for the judge alone to determine admissibility of co-conspirator statements.[52] The court relied on the reasoning, first set out by Judge Learned Hand, that it is more logical that the judge decide the admissibility of co-conspirator statements just as he or she generally decides fact issues on which the competence of evidence depends.

Since the new Federal Rules of Evidence have been in effect, the Third Circuit has also considered the question of whether the judge or the jury admits co-conspirator declarations. Viewing the applicability of the co-conspirator rule as a question of competence of the evidence, the court held in *United States v. Trowery*[53] that the trial judge alone must determine the admissibility of co-conspirator statements as a matter of law.[54] Although it framed the issue as one of the competence or reliability of the declaration, the court did not base its holding on rule 104(a). Instead, its holding was based on prior case law which ultimately referred to the logic of the seminal cases of *Carbo* and *Dennis*.[55]

Determination by Jury

Although none of the circuits has found specifically that rule 104(b) requires the jury to admit co-conspirator statements,[56] in practice, the jury often is instructed to decide if a conspiracy existed and if the defendant was a member before it may consider the declaration against the defendant. This dual determination by the judge and jury is the traditional way in which the prerequisites for admitting co-conspirator statements have been assessed. In at least one circuit, trial practice and standard jury instructions continue to favor a jury decision on the applicability of co-conspirator declarations.[57] A typical instruction to the jury recites:

51. 550 F.2d 1294 (2d Cir. 1977).

52. *Id.* at 1297-98, citing United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

53. 542 F.2d 623 (3d Cir. 1976).

54. *Id.* at 626-27.

55. *See* text accompanying notes 47-50 *supra.*

56. Until its recent ruling in United States v. James, 576 F.2d 1121 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir. 1979), the United States Court of Appeals for the Fifth Circuit seemed disposed to view rule 104(b) as requiring the jury to decide if a co-conspirator's statement is admissible. The court had noted, in a footnote, that admissibility of co-conspirator declarations "depends . . . on the existence of a conspiracy, a 'fulfillment of a condition of fact' similar to that described in Rule 104(b)." United States v. Ochoa, 564 F.2d 1155, 1157 n.2 (5th Cir. 1977).

57. *See* United States v. Gutierrez, 576 F.2d 269, 274 (10th Cir. 1978); Dennis v. United States, 346 F.2d 10, 16 (10th Cir. 1965), *rev'd on other grounds*, 384 U.S. 855 (1966).

> If it is established beyond a reasonable doubt that a conspiracy existed, and that the defendant was one of its members, then the acts and declarations of any other member of such conspiracy in or out of such defendant's presence, done in furtherance of the objects of the conspiracy, and during its existence, may be considered as evidence against such defendant.[58]

In addition, although trial courts in certain circuits maintain that the judge must rule on co-conspirator statements, these courts in practice often resubmit the determination of whether the defendant was part of a conspiracy to the jury before allowing it to consider a declaration against a co-conspirator/defendant.[59] This inconsistent policy seems to be most prevalent in the circuits which ruled prior to the enactment of the new Federal Rules of Evidence that the judge was to decide the preliminary questions upon which the admission of co-conspirator statements is dependent. Thus, on occasion, several circuits have continued to permit the judge to admit co-conspirator declarations, subject to a later jury finding that the conspiracy existed and the defendant participated in it.

Recommendation

Preliminary review by the trial judge before admission of co-conspirator statements is not only more reasonable than to leave the determination to the jury, but it is also required by rule 104(a). Although it initially appears that either rule 104(a) or rule 104(b) could control the division of responsibility between judge and jury in admitting co-conspirator declarations pursuant to rule 801(d)(2)(E),[60] closer analysis of the rationale behind rule 104 indicates that rule 104(a) requires the judge to make such decisions.

It is unrealistic to expect a jury to engage in the two-step process of deciding the admissibility of a co-conspirator declaration before deciding the defendant's guilt, as rule 104(b) would require. Judge Learned Hand observed that "it is a practical impossibility for laymen, and for that matter for most judges, to keep their minds in the isolated compartments . . ." which are necessary if they are to ignore a co-conspirator's declaration while they consider the independent evidence of the conspiracy.[61] However, if the jury is unable to analyze the evidence on

58. LaBuy, Jury Instructions in Federal Criminal Cases, § 10.00, 36 F.R.D. 457, 502 (1965). *See also* E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 27.06 (3d ed. 1977).

59. United States v. Kahan, 572 F.2d 923, 936 (2d Cir. 1978); United States v. Mitchell, 556 F.2d 371, 377 (6th Cir.), *cert. denied*, 434 U.S. 925 (1977); United States v. King, 552 F.2d 833, 849 (9th Cir. 1976).

60. *See* text accompanying note 20 *supra*.

61. United States v. Dennis, 183 F.2d 201, 231 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

these two levels, the admissibility question will never be formally resolved. Even were the jury to go through the motions of assessing the evidence of the conspiracy before admitting the co-conspirator statement, its decision is nevertheless likely to have been colored by having heard the statement.

By obligating the judge to determine the admissibility of co-conspirator statements, rule 104(a) seeks to avoid the prejudice to a defendant which would occur if a jury relied upon the declarations without independently deciding their admissibility.[62] Only by having the judge initially determine the admissibility of a co-conspirator's statement can such prejudice be prevented. The Advisory Committee's Note indicates that the preliminary questions of conditional relevancy, reserved for the jury by rule 104(b), are issues of fact well within the ability of a jury to resolve by using common sense.[63] The risk of prejudice to the defendant is not present in most relevancy determinations, as it is in determinations of the admissibility of co-conspirator statements which can be prejudicial precisely because they are relevant. Thus, an analysis of the policy behind rule 104 reveals that to avoid prejudicing the defendant, rule 104(a) requires the judge to consider the preliminary prerequisites and decide whether co-conspirator declarations are to be admitted into evidence.[64]

A second reason why the trial judge, rather than the jury, should decide admissibility of co-conspirator statements becomes evident in cases where the defendant is charged with the crime of conspiracy. In such cases, the ultimate issue of guilt coincides with the preliminary issues to be resolved prior to admission of co-conspirator utterances. A jury which is instructed to preliminarily find the existence of a conspiracy and the defendant's participation in it by the same "beyond a reasonable doubt" standard used to decide guilt, will have already decided the ultimate issue of conspiracy without benefit of the co-conspirator declarations. This procedure would restrict the usefulness of admissible co-conspirator statements to cases in which a defendant was charged with a substantive offense. This anomalous result surely runs counter to the purpose of rule 801(d)(2)(E) which renders extrajudicial

62. *See* United States v. James, 576 F.2d 1121, 1129-30 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575, 579 (5th Cir. 1979).

63. 28 U.S.C. app., Notes of Advisory Committee on Proposed Rules [of Evid.], Rule 104, Subdivision (b) (1976). The Advisory Committee gives as an example of a question of conditional relevancy a statement introduced to prove X was on notice. The statement is irrelevant unless X heard it.

64. *But see* Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back Into The Co-Conspirator Rule*, 5 HOFSTRA L. REV. 77 (1976) (analysis concluding that rule 104(b) governs admission of co-conspirator statements).

statements made by a fellow conspirator admissible as nonhearsay, in part, because of the nature of the crime of conspiracy.[65]

Resolution of the judge/jury question does not clarify how the judge is to admit co-conspirator declarations. Although courts have long allowed co-conspirator statements to be introduced subject to subsequent connection of the defendant to the conspiracy,[66] the wiser method for admitting such testimony is for the judge to rule on the preliminary issues before a witness testifies to such declarations. In this way, prejudice to the defendant or the need to declare a mistrial may be avoided should the sum of the evidence fail to show a conspiracy existed or that the defendant participated in it.

The judge may insure that the jury does not hear a co-conspirator statement until it is properly deemed admissible in a number of ways: (1) by ordering that all independent proof of the conspiracy be presented before a proffer of co-conspirator statements is made,[67] (2) by conducting a pretrial hearing into the anticipated independent proof of the conspiracy and the anticipated proof in rebuttal,[68] or (3) by conducting a like hearing, outside the presence of the jury, when it appears that, to answer a question, a witness must recount an out-of-court statement of a co-conspirator.[69] Limiting the jury's exposure to co-conspir-

65. *See* text accompanying notes 6-8 *supra*.

66. This procedure was followed in United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977), and reflects the rule that the order of proof is generally within the discretion of the trial court. The United States Court of Appeals for the Eighth Circuit recently suggested that district courts within its jurisdiction conditionally admit co-conspirator statements. It set forth the following procedure for courts to follow:

> [O]n the record, [out of the jury's presence] caution the parties (a) that the statement is being admitted subject to defendant's objection; (b) that the government will be required to prove by a preponderance of the independent evidence that the statement was made by a co-conspirator during the course and in furtherance of the conspiracy; (c) that at the conclusion of all the evidence the court will make an explicit determination for the record regarding the admissibility of the statement; and (d) that if the court determines that the government has failed to carry [its] burden . . .the court will . . . declare a mistrial, unless a cautionary instruction to the jury to disregard the statement would suffice to cure any prejudice.

United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978).

67. Chief Judge Coffin observed in United States v. Petrozziello, 548 F.2d 20, 23 n.3 (1st Cir. 1977) that the district judge had so ordered. Upon *rehearing en banc* of United States v. James, 590 F.2d 575, 581-82 (5th Cir. 1979), the court indicated that preferred practice in the Fifth Circuit will be for the trial judge to order that the nonhearsay proof be presented before co-conspirator declarations. A problem in this approach is that the court will not have had a chance to hear the defendant's case before it must rule on the admissibility of the co-conspirator statements. If the circuit has adopted a standard of proof by a preponderance of the evidence or beyond a reasonable doubt, the judge's ruling must wait until he has considered any evidence in rebuttal of the conspiracy which is presented by the defendant.

68. In United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978), the court held a pretrial hearing, out of the presence of the jury, so that the judge could determine the admissibility of co-conspirator declarations. A drawback to this procedure is that the lengthy proof often required to be presented at the hearing would have to be repeated at trial before a jury.

69. This practice is similar to that required by the court in United States v. James, 576 F.2d

ator declarations in these ways, until after the judge has conclusively admitted them, serves to avoid prejudice to the defendant and to avoid confusing the jury over temporary cautionary instructions restricting the use of "hearsay" statements to the declarant. It also prevents leaving the jury with the impression that, after hearing further evidence, the judge decided the defendant was a member of a conspiracy.[70]

ADMISSION OF DECLARATIONS: STANDARD OF PROOF

Aside from the question of whether the judge or jury should decide if a co-conspirator's declaration is admissible, there remains the troublesome question of the standard of proof which the prosecution must meet in establishing the existence of a conspiracy and the defendant's connection with it. Unless the proper burden of proof is met and the statements are shown to have been made in the course of and in furtherance of the conspiracy, co-conspirator declarations may not be admitted against a defendant.[71] Determination of the proper standard of proof on the admissibility question often is complicated by the fact that a separate burden of persuasion (*i.e.* beyond a reasonable doubt) exists for deciding the ultimate issue of guilt in criminal conspiracy cases.[72]

It has been well accepted that the defendant's participation in the conspiracy must be shown by evidence independent of the statement itself.[73] The United States Supreme Court acknowledged that "declarations [of co-conspirators] are admissible . . . only if there is proof *aliunde* that he [the defendant] is connected with the conspiracy. Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."[74] It is this independent proof requirement which generally is the crucial element in determining whether a co-conspirator's statement is admissible. Challenges to the sufficiency of the in-

1121 (5th Cir. 1978). To safeguard a defendant's right against undue prejudice and to avoid jury confusion, the court held that rule 104(c) required a judge to both determine admissibility of co-conspirator declarations and to conduct any hearings necessary for that determination outside the presence of the jury. *Id.* at 1132. However, this holding was withdrawn during the *rehearing en banc*, 590 F.2d 575, 577 (5th Cir. 1979).

70. *See* United States v. Allegretti, 340 F.2d 243, 245 (7th Cir. 1964) in which, as part of a jury instruction, the trial judge stated, "I now rule that the Government has sustained its avowed burden and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement [out of the defendant's presence] and the several defendants." The appellate court approved the instruction. 340 F.2d at 256 (7th Cir. 1964).

71. *See* FED. R. EVID. 801(d)(2)(E) and text accompanying notes 9-11 *supra*.

72. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 341, 798-99 (2d ed. E. Cleary 1972).

73. Glasser v. United States, 315 U.S. 60 (1942).

74. *Id.* at 74-75 (citations omitted).

dependent evidence account for a major portion of convictions appealed on the basis of co-conspirator declarations.

However, neither rule 801(d)(2)(E) nor the Federal Rules of Evidence in their entirety indicate the burden of proof which the independent evidence of the conspiracy must meet. Nor has the United States Supreme Court answered the question of the appropriate standard of proof for admitting co-conspirator declarations. As a result, the various federal circuit courts of appeals differ widely on the quantum of proof required to sufficiently show a defendant's participation in the conspiracy. They range from a strict beyond reasonable doubt standard,[75] to a fair preponderance of the evidence standard,[76] to a standard of a prima facie showing,[77] and to a mere substantial independent evidence standard.[78] Of the circuits which have had occasion to review the burden for admitting co-conspirator declarations since the new rules of evidence were enacted, five have modified their prior standard of proof.[79] Other circuits have either reaffirmed the quantum of evidence previously required or have not adequately come to terms with the problem under rules 801(d)(2)(E) and 104.[80]

Substantial Independent Evidence

While the United States Supreme Court has not directly addressed the question of the appropriate standard of proof for admission of co-conspirator declarations, in *United States v. Nixon*,[81] the Court discussed in dictum the requisite quantum of evidence for co-conspirator remarks to be admissible against another defendant. The trial judge must be satisfied that a "sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant [has been made and that] the declarations at issue were in furtherance of that conspiracy."[82] The Court noted that "as [a] preliminary matter, there must be substantial, independent evidence of the conspiracy, at

75. *See* text accompanying notes 129-33 *infra*.

76. *See* text accompanying notes 100-28 *infra*.

77. *See* text accompanying notes 88-99 *infra*.

78. *See* text accompanying notes 82-87 *infra*.

79. United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978); United States v. Enright, 579 F.2d 980 (6th Cir. 1978); United States v. James, 576 F.2d 1121 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir. 1979); United States v. Bell, 573 F.2d 1040 (8th Cir. 1978); United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

80. United States v. Dixon, 562 F.2d 1138 (9th Cir. 1977); United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977); United States v. Trotter, 529 F.2d 806 (3d Cir. 1976).

81. 418 U.S. 683 (1974). The Court's observation arose when it noted that co-conspirator statements were one basis on which the subpoenaed material of the President might be admissible as evidence.

82. *Id.* at 701.

least enough to take the question to the jury."[83]

Although this is the United States Supreme Court's most definitive statement on the quantum of evidence necessary to admit co-conspirator statements, "substantial independent evidence"[84] is a somewhat ambiguous standard. The Court likened it to the prima facie standard[85] when it remarked that there must be enough independent proof of the conspiracy to submit the question to the jury. Whether this burden is lower than standards of proof beyond a reasonable doubt or by a preponderance of the evidence is not clear from the Court's statement. Yet, because of its similarity to the prima facie standard, it is likely that the test of substantial independent evidence is one of the less burdensome tests.[86]

Prima Facie Standard

A prima facie case is considered to be proved if the evidence (unless rebutted by sufficient evidence to the contrary) is adequate to support a finding but does not compel a conclusion based on it.[87] It is the standard usually employed by the judge to decide if there is enough evidence to overcome a motion for directed verdict.[88] Therefore, if admission of co-conspirator's statements depends upon proof of a prima facie case, the independent proof must create reasonable inferences sufficient to support a finding that there was a conspiracy and that the defendant and the declarant participated in it.

83. *Id.* at 701 n.14. This burden of proof was adopted by the court in United States v. James, *rehearing en banc*, 590 F.2d 575, 581 (5th Cir. 1979), as the *preliminary* standard of proof necessary if a co-conspirator's statement is to be admitted at the close of the prosecution's case.

84. In the well-reasoned decision, United States v. Herrera, 407 F. Supp. 766 (N.D. Ill. 1975), Judge Marshall adopted the standard of proof suggested by the United States Supreme Court. "Declarations of alleged co-conspirators are admissible against a defendant if there is substantial independent evidence from which a reasonable mind could infer the existence of a conspiracy or joint venture and the defendant's connection therewith." *Id.* at 773.

85. *See* text accompanying notes 88-99 *infra*.

86. Proof by substantial independent evidence or by a prima facie showing has generally been deemed the least onerous burden of proof. *See* United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Trotter, 529 F.2d 806, 812 (3d Cir. 1976). However, United States Courts of Appeals for the Second and Fifth Circuits regard a prima facie standard, or one in which there is enough evidence to submit a case to the jury, as the most onerous burden of proof. Those courts seem to view a prima facie showing as equivalent to a showing beyond a reasonable doubt. *See* United States v. Wiley, 519 F.2d 1348, 1350-51 (2d Cir. 1975); United States v. Oliva, 497 F.2d 130, 132-33 (5th Cir. 1974). Since, for submission of a case to the jury, both circuits require that the evidence must be able to satisfy a reasonable juror beyond a reasonable doubt, the courts apparently reason that such prima facie evidence must *compel* a finding of conspiracy beyond a reasonable doubt, rather than merely support a finding of conspiracy beyond a reasonable doubt.

87. Garland & Snow, *The Co-Conspirators Exception to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L. 1, 8 (1972).

88. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 338, 789-90 (2d ed. E. Cleary ed. 1972).

Prior to the enactment of the Federal Rules of Evidence, when the jury commonly was instructed to redetermine the admissibility of co-conspirator statements, the majority of courts required that the judge initially find prima facie proof of the conspiracy and the defendant's involvement in it.[89] However, since the new rules have been in effect, a a number of courts of appeals have abandoned the burden of prima facie proof and have adopted the higher standard of proof by a preponderance of the evidence.[90] Only the United States Court of Appeals for the Ninth Circuit,[91] has elected to retain the prima facie standard for admitting co-conspirator declarations after having considered the question in light of the new Federal Rules of Evidence.

The Ninth Circuit requires that a prima facie case of conspiracy must be established by the close of the government's case in order to admit co-conspirator statements. That court has clearly defined its prima facie standard as not requiring proof beyond a reasonable doubt. In the 1963 decision, *Carbo v. United States*,[92] the court declared that "[t]he test is not whether the defendants' connection had by independent evidence been proved beyond a reasonable doubt, but whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made."[93] In the recent case of *United States v. Dixon*,[94] the Ninth Circuit reiterated the quantum of evidence it requires as "substantial independent evidence, other than hearsay . . . enough to make a prima facie case."[95] The evidence need not be unchallenged, since in determining a prima facie case the court must view the evidence in the light most favorable to the prosecution.[96] Furthermore, that same court in *United States v. Calaway*[97] has held that once the existence of a conspiracy is clearly established by a prima facie showing, a defendant's complicity in the conspiracy need only be shown by *slight* evidence.[98]

89. United States v. Santiago, 582 F.2d 1128, 1131-32 (7th Cir. 1978); United States v. Enright, 579 F.2d 980, 983 (6th Cir. 1978); United States v. James, 576 F.2d 1121, 1127 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575, 578 (5th Cir. 1979); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977); Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

90. *See* text accompanying notes 100-28 *infra*.

91. *See* United States v. Dixon, 562 F.2d 1138 (9th Cir. 1977).

92. 314 F.2d 718 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964).

93. *Id.* at 737.

94. 562 F.2d 1138 (9th Cir. 1977).

95. *Id.* at 1141, quoting United States v. Calaway, 524 F.2d 609, 612 (9th Cir. 1975). *See also* United States v. Avila-Macias, 577 F.2d 1384, 1388 (9th Cir. 1978); United States v. Testa, 548 F.2d 847, 853 (9th Cir. 1977).

96. 562 F.2d at 1141.

97. 524 F.2d 609 (9th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

98. *Id.* at 612, 615.

The Ninth Circuit has stressed that the quantum of prima facie proof required to admit co-conspirator declarations falls below beyond a reasonable doubt standard. In rejecting that high burden, the court implicitly acknowledges that co-conspirator statements would be of little benefit if, initially, the independent proof had to show a conspiracy existed beyond a reasonable doubt. The choice of the prima facie standard seems to reflect the fact that a similar weighing of evidence occurs when a judge decides a motion for directed verdict on a conspiracy charge as when he or she decides the admissibility of co-conspirator declarations. In both instances, the judge must find that the prosecution's proof reasonably supports a finding that the defendant participated in a conspiracy. The prima facie standard for admitting co-conspirator utterances may defy exact definition. Nevertheless, the label closely approximates the amount of evidence which a judge actually needs to consider in order to sufficiently convince him- or herself that co-conspirator declarations are admissible.

Preponderance of Evidence Standard

A preponderance of the evidence standard, which is the common burden of persuasion in civil cases,[99] generally requires that the evidence in support of the contested fact is more convincing or of greater weight than the opposing evidence.[100] If the criterion for admission of co-conspirator statements is proof by a preponderance of the evidence, the test would be met if the evidence as a whole showed that the conspiracy and the defendant's connection to it were more probable than not.

Five United States Courts of Appeals, the First,[101] Fifth,[102] Sixth,[103] Seventh,[104] and Eighth[105] Circuits, recently changed the burden of proof required for admission of co-conspirator statements to a preponderance of the evidence standard. In the view of those courts, this standard is a higher burden than the prima facie standard which was previously required.[106] Each court decided that the higher stan-

99. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 339, 793-94 (2d ed. E. Cleary 1972).

100. *Id.*

101. United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

102. United States v. James, 576 F.2d 1121 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir. 1979).

103. United States v. Enright, 579 F.2d 980 (6th Cir. 1978).

104. United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978).

105. United States v. Bell, 573 F.2d 1040 (8th Cir. 1978).

106. *See, e.g.*, United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977). United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978).

dard of proof was necessary since rule 104(a) requires the trial judge to make a conclusive determination of the admissibility of co-conspirator declarations. To require only a prima facie showing was logical when the jury had the responsibility of determining anew the admissibility of co-conspirator statements. Now, however, since the judge alone must admit such statements, to require him or her to find it "more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy,"[107] sets the standard high enough to adequately protect the defendant, but "not so high as to exclude trustworthy relevant evidence."[108]

During a recent rehearing of *United States v. James*,[109] the Fifth Circuit set forth a unique combination of burdens of proof which must now be met before co-conspirator declarations may be admitted. The Fifth Circuit's new two-tier test requires that the trial judge find *substantial, independent evidence* of the conspiracy at the end of the government's case. Once the judge has admitted the co-conspirator statement, he or she must again weigh the independent evidence at the end of the trial and determine by a *preponderance* of the evidence that the defendant was a member of a conspiracy and the statement was made in the course and in furtherance of the conspiracy. Although this approach appears to require initially a lesser quantum of evidence, the ultimate burden of proof in the Fifth Circuit remains a preponderance of the evidence.

Although these five circuit courts of appeals agree on the burden of proof to be met by a party seeking admission of co-conspirator statements, they disagree on whether the burden must be met by consideration only of the independent evidence. Rule 104(a) allows a judge to consider hearsay and other inadmissible evidence when preliminarily determining the admissibility of co-conspirator declarations.[110] The United States Court of Appeals for the First Circuit, in *United States v. Martorano*,[111] noted that rule 104(a) may allow the judge to consider the very statement seeking admission when he or she weighs the evidence of a conspiracy. Using the declaration itself to contribute to the

107. United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977).

108. United States v. James, 576 F.2d 1121, 1130 (5th Cir. 1978).

109. 590 F.2d 575, 580-83 (5th Cir. 1979).

110. Federal Rule of Evidence 104(a) states that "[i]n making its determination [the court] is not bound by the rules of evidence except those with respect to privileges."

111. 557 F.2d 1, *rehearing denied*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978).

evidence of the conspiracy would constitute the bootstrapping cautioned against in *Glasser v. United States*.[112] However, the First Circuit doubted the continued viability of the *Glasser* rule that admission of co-conspirator remarks may only be based on evidence independent of those remarks.[113] The court observed that the policy behind rule 104(a) recognizes a trial judge's ability to weigh the reliability of inadmissible evidence such as co-conspirator statements. It felt that a criminal defendant would still be protected if the judge were to:

> require significant independent evidence of the existence of the conspiracy, deviating from the *Glasser* practice only to the extent of permitting the district court to consider the independent evidence in the light of the color shed upon it by the highly trustworthy and reliable portions of the hearsay utterance seeking admission.[114]

Thus, the First Circuit recommended that the judge give limited weight to the challenged declaration when deciding whether to admit it.[115]

Conversely, the United States Courts of Appeals for the Fifth[116] and Eighth[117] Circuits have adhered to the traditional rule of *Glasser* which states that admissibility of co-conspirator statements must be based on an independent showing of the conspiracy and the defendant's role in it. The court in *United States v. James*[118] construed rule 104(a) to permit the trial judge to consider other inadmissible evidence, but not the statement for which admissibility is being determined, lest there be insufficient corroboration of the statement's reliability.[119]

Two other United States Courts of Appeals, the Second[120] and

112. 315 U.S. 60 (1942). *See* text accompanying note 74 *supra*.

113. The admissibility of co-conspirator statements in United States v. Martorano, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978) was finally resolved without need to consider the statements themselves in assessing the existence of a conspiracy. The crucial co-conspirator declaration was admitted as a verbal act, rather than as the statement of a co-conspirator. Thus, the court avoided the need to regard *Glasser* as overruled by rules 104(a) and 801(d)(2)(E).

114. *Id.* at 408. *See also* United States v. Martorano, 557 F.2d 1, 12 (1st Cir. 1977).

115. *See* Bergman, *The Co-Conspirators' Exception: Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence*, 5 HOFSTRA L. REV. 99 (1976). Under the author's proposal, the statements themselves could be considered by the judge, along with the nonhearsay evidence, so long as the totality of the evidence convinced the judge beyond a reasonable doubt that a conspiracy existed. If the judge was not convinced of the conspiracy, the defendants would be acquitted of the conspiracy count. The author thinks this solution is the most workable and fair, since he believes judges and jurors who hear co-conspirator declarations do not really disregard them when deciding if the burden of proof has been met.

116. United States v. James, 576 F.2d 1121 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575, 581 (5th Cir. 1979).

117. United States v. Bell, 573 F.2d 1040 (8th Cir. 1978). Neither the Sixth nor Seventh Circuits addressed the question of whether the "hearsay" statement itself may be considered in meeting the preponderance of the evidence burden.

118. 576 F.2d 1121 (5th Cir. 1978), *rehearing en banc*, 590 F.2d 575 (5th Cir. 1979).

119. *Id.* at 1131.

120. United States v. Geaney, 417 F.2d. 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

Third[121] Circuits, adopted a fair preponderance of the evidence standard for admitting co-conspirator declarations prior to enactment of the new Federal Rules of Evidence. The fair preponderance standard was first set forth by the United States Court of Appeals for the Second Circuit in its 1969 opinion, *United States v. Geaney*.[122] In that case, the court stated:

> [T]he judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility . . . declare a mistrial if the defendant asks for it.[123]

The relative burden of the preponderance test of the Second Circuit is illustrated in *United States v. Stanchich*,[124] where the judge dismissed the conspiracy count but allowed the "co-conspirator" statements to be considered by the jury on the substantive counts. The trial judge felt that the evidence, including the admissible co-conspirator declarations, did not meet the Second Circuit's beyond a reasonable doubt test for submission of the conspiracy count to the jury.[125] However, the independent evidence of the conspiracy was found to meet the lower preponderance test necessary for admission of the statements.[126]

The United States Court of Appeals for the Third Circuit adopted the fair preponderance standard in the 1971 case of *United States v. Bey*.[127] In doing so, it based the required quantum of evidence for admitting co-conspirator declarations upon the standard set by the Second Circuit.[128]

As envisioned by the courts which have adopted it, the preponderance standard is less burdensome than the beyond a reasonable doubt standard for admission of co-conspirator statements. Several of the circuits indicate that by requiring a preponderance standard, rather than a prima facie showing, they have increased the requisite burden of proof.

121. United States v. Bey, 437 F.2d 188 (3d Cir. 1971).
122. 417 F.2d 1116 (2d Cir. 1969).
123. *Id.* at 1120.
124. 550 F.2d 1294 (2d Cir. 1977).
125. *See* note 86 *supra*.
126. 550 F.2d at 1299.
127. 437 F.2d 188 (3d Cir. 1971).
128. *Id.* at 191. *See also* United States v. Trotter, 529 F.2d 806, 811 (3d Cir. 1976).

This higher standard was deemed necessary to safeguard defendants since it is now the judge alone who decides the applicability of co-conspirator remarks. As with the prima facie showing, the preponderance standard seems to require introduction of evidence sufficient to convince the judge that the defendant participated in the conspiracy. The principal difference between the two quanta of proof is that in order to decide by a preponderance the judge must hear and weigh all the evidence—that presented by the prosecution and that presented in rebuttal by the defendant. The contrasting views of the First and Fifth Circuits on whether or not the judge can rely on the disputed statement itself when deciding admissibility may present less of a real difference than appears at first reading. As a judge decides whether the independent evidence of the conspiracy supports admission of the statements, it is almost as difficult for him or her as it is for a jury to compartmentalize the declarations at issue. In actuality, many judges consider the utterance along with the independent proof in making their determination. Therefore, in the circuits which do not permit the trial judge to rely on the co-conspirator remark itself, the only real difference may be that those judges must justify their decisions to admit co-conspirator statements in terms of the independent evidence alone.

Beyond a Reasonable Doubt Standard

None of the circuit courts of appeals expressly requires that the admission of co-conspirator declarations be based on independent proof, beyond a reasonable doubt, that the defendant was involved in the conspiracy.[129] However, courts in reality impose a beyond a reasonable doubt standard on the admissibility inquiry when they instruct the jury to reassess the independent evidence of conspiracy and use the declaration against a defendant only if it first is convinced beyond a reasonable doubt that the defendant and the declarant were members of the conspiracy.[130]

The United States Court of Appeals for the Tenth Circuit[131] continues such a practice. In addition, the United States Court of Appeals for the Ninth Circuit has recently undermined its professed prima facie standard by resubmitting to the jury the issue of whether the co-conspirators' statements may be used against the defendant.[132] The re-

129. Judge Weinstein proposes a standard of proof beyond a reasonable doubt. 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 104[05], 104-44 (1977).

130. *See* text accompanying note 59 *supra*.

131. *See* Dennis v. United States, 346 F.2d 10, 16 (10th Cir. 1965), *rev'd on other grounds*, 384 U.S. 855 (1966).

132. United States v. King, 552 F.2d 833 (9th Cir. 1976).

viewing court has held the trial judge's failure to rule conclusively on the statement's admissibility to be harmless error, observing that the defendant could obviously not have been prejudiced by a second layer of fact-finding.[133] Nevertheless, so long as trial courts in the Ninth Circuit continue to instruct juries to consider the independent proof of conspiracy before considering co-conspirator declarations against a defendant, and juries make an honest attempt to do so, the true burden is proof beyond a reasonable doubt.

Recommendation

The various federal circuit courts of appeals are not in total accord over the quantum of evidence nominally required to admit a co-conspirator's declarations against a defendant.[134] The lack of uniformity exists not only among the circuits, but also within at least one of the circuits.[135] Yet, numerous cases decided within the last two years have served to alleviate some of the confusion. Recently, a trend has become apparent toward adoption of a preponderance of the evidence standard. Seven circuit courts[136] currently espouse it as the quantum proof required for admitting co-conspirator statements into evidence.

The preponderance standard for the preliminary question of admitting co-conspirator utterances is preferable to the beyond a reasonable doubt standard,[137] which is too high a burden of proof, particularly when it must be applied by the jury. Instructing a jury to use a standard of proof beyond a reasonable doubt renders co-conspirator declarations virtually useless, since the evidence has to convince a jury to convict on a conspiracy count before the jury can consider the co-conspirator's remark against the defendant. In determining if a defendant participated in the conspiracy, a standard of proof of less than

133. *Id.* at 849.

134. The United States Courts of Appeals for the Tenth and District of Columbia Circuits apparently have not reexamined the burden of proof necessary for admission of co-conspirator statements since the new Federal Rules of Evidence went into effect.

135. As an example of the lack of uniformity within a circuit, consider that the Fourth Circuit adopted a "fair preponderance of the independent evidence" test in United States v. Jones, 542 F.2d 186 (4th Cir. 1976), but indicated in the same opinion that slight evidence might meet the preponderance requirement. In United States v. Stroupe, 538 F.2d 1063 (1976), decided shortly after *Jones*, the court stated that the quantum of independent evidence needed to permit admission of co-conspirator statements was "enough to take the question to the jury," *i.e.*, prima facie proof of the conspiracy or proof by a fair preponderance of the evidence. *Id.* at 1065. From the interchangeability of these terms, it is difficult to tell what standard of proof the Fourth Circuit actually requires.

136. The United States Courts of Appeals for the First, Second, Third, Fifth, Sixth, Seventh and Eighth Circuits presently require that a preponderance standard be met. *See* text accompanying notes 100-28 *supra*.

137. *See* text accompanying notes 129-33 *supra*.

beyond a reasonable doubt is logically permissible. The burden of persuasion required for admission of co-conspirator remarks may and should be separate and distinct from the beyond a reasonable doubt burden required for the ultimate determination of guilt on the conspiracy issue. This is particularly so when it is the judge who must rule on the admissibility of co-conspirator declarations.

In theory, the lesser burdens of proof by a preponderance of the evidence and by prima facie evidence appear to require consideration of different bodies of evidence. To conclude by a preponderance of the evidence that a defendant was involved in a conspiracy entails consideration of all the evidence presented by both parties, whereas to conclude by prima facie proof that a defendant was part of a conspiracy only requires consideration of the prosecution's evidence taken as true and uncontroverted.

However, as applied in practice to date, the preponderance of the evidence, prima facie, and substantial independent evidence tests are not very different.[138] Regardless of the standard invoked, reviewing courts are reluctant to find insufficient evidence to support a trial court's admission of co-conspirator statements.[139] And, although the facts of each case are unique, whichever burden of proof is purportedly required, the courts of appeals use the same criteria to decide if the conspiracy has been established and the defendant connected with it. They weigh the nature and number of meetings, telephone calls and conversations between the declarant and the defendant as well as particular acts of the defendant which show an awareness of or involvement in the conspiracy, or which are highly suggestive of the defendant's participation. At some point in this process, the acts of the defendant, taken as a whole, indicate to the judge that the defendant was part of the conspiracy, even though an innocent explanation for each act might be possible if it were viewed in isolation. The critical point of sufficiency of the evidence defies measurement by any precise standard of proof. As Judge Friendly observed, "[w]hen the matter is viewed from the standpoint of the trial judge, it may be hard to say more than that he must satisfy himself of the defendant's participation

138. It is possible as more circuits adopt the preponderance test for deciding the admissibility of co-conspirator remarks, that trial practice in those circuits will vary increasingly from the practice of courts in circuits espousing a prima facie standard.

139. *But see* United States v. Holder, 560 F.2d 953 (8th Cir. 1977); United States v. Peterson, 549 F.2d 654 (9th Cir. 1977); United States v. Stroupe, 538 F.2d 1063 (4th Cir. 1976); United States v. Cirillo, 499 F.2d 872 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); United States v. Oliva, 497 F.2d 130 (5th Cir. 1974).

in a conspiracy on the basis of the nonhearsay evidence."[140] Likewise, appellate judges apparently find the burden of proof has been met when their assessment of the evidence convinces them of the defendant's participation in the conspiracy.

Thus, it appears that upon appellate review, admission of co-conspirator statements is little affected by the standard of proof selected as appropriate by the reviewing court, whether it is a preponderance, prima facie or substantial independent evidence burden. The only distinction between these standards is that the trial judge must hear the defendant's proof before a preponderance test can be invoked and co-conspirator declarations admitted. As a result, a preponderance standard will require trial courts either to conduct a hearing outside the presence of the jury or to conditionally admit co-conspirator declarations subject to a ruling at the close of the defendant's case on whether the preponderance standard has been satisfied. In view of these restrictions on when the judge can rule on admissibility and the fact that defense evidence may not appreciably add to the judge's ability to assess the evidence corroborating the conspiracy which is presented by the prosecution, the preponderance standard is not the best.

Proof by substantial, independent evidence would be a better standard because it comes closest to naming the criteria actually used by judges to satisfy themselves that a conspiracy existed. As a standard of proof, it has the advantage of not being confused with the burden to be met at other phases of a trial (*i.e.*, a prima facie showing) or at other types of trials (*i.e.*, a preponderance test). Although the label used to identify the standard of proof may not change the amount of evidence an individual judge considers sufficient, the more honest denomination of a standard of proof by substantial independent evidence is the best way to put prosecutors and defendants on notice of instances when co-conspirator statements can predictably be used against a defendant.

CONCLUSION

Under the new Federal Rules of Evidence, the questions of who determines the admissibility of co-conspirator statements and by what standard of proof have not been uniformly resolved by the various circuit courts of appeals. A majority of the circuits has held that rule 104(a) requires that the judge alone decide when co-conspirator declarations may be used against a defendant. A slightly narrower majority

140. United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

of the courts has found that the judge must make the determination of the defendant's participation in the conspiracy by a preponderance of the evidence. In view of the similar results reached by reviewing courts regardless of which of the less-than-beyond a reasonable doubt standards of proof is employed, it is recommended that a burden of substantial independent evidence be generally required to support admission of co-conspirator remarks. But more crucial than the labeling of the requisite standard of proof is a requirement that judges rule on the admissibility of co-conspirator declarations out of the jury's presence.

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